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7 **UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

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9 FEDERAL TRADE COMMISSION, *et al.*,

10 Plaintiffs,

11 v.

12 AMAZON.COM, INC., a corporation,

13 Defendant.

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CASE NO.: 2:23-cv-01495-JHC

**PLAINTIFFS' REPLY IN
SUPPORT OF MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS**

NOTE ON MOTION CALENDAR:
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INTRODUCTION

Amazon generally argues that custodial searches will be sufficient to provide Plaintiffs with relevant personnel files and documents relating to foreign investigations. At the same time, Amazon argues that the Court should not order targeted collections of the same documents because they are particularly sensitive (personnel files) or because production would violate principles of international comity (foreign investigation materials). These positions contradict one another and illustrate that Amazon's arguments are pretextual. If Amazon were concerned about the sensitivity of its personnel files, it would have withheld them from its custodial

1 productions. If Amazon were concerned about international comity, it would not produce any
 2 documents that it believes violate that principle. Amazon has shown no undue burden, and the
 3 relevant materials should be produced, whether from custodial files or centralized repositories.

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**I. AMAZON CANNOT JUSTIFY ITS REFUSAL TO PRODUCE RELEVANT
 5 PERSONNEL MATERIALS FROM ITS CENTRAL REPOSITORY.**

6 Amazon's asserted justifications for its refusal to collect and produce personnel reviews
 7 and evaluations for agreed-upon document custodians from a central repository, Opp. 3-8 (Dkt.
 8 #350), are self-defeating. On the one hand, Amazon argues that Plaintiffs "do not need these
 9 documents" given the "limited insights they might provide" and that production is unwarranted
 10 because of the "highly sensitive" nature of the materials. *Id.* at 4-7. But on the other hand,
 11 Amazon claims that a production from its centralized files is unnecessary because "Plaintiffs are
 12 already likely to receive additional personnel reviews" through Amazon's custodial review. *Id.* at
 13 7-8. The fact that Amazon has agreed to produce responsive personnel materials in custodial files
 14 shows that its other arguments for refusing to produce *those same materials* from its central
 15 repository are pretextual.¹

16 Amazon's attempts to minimize the relevance of personnel reviews are also undercut by
 17 its own internal documents. In Amazon's telling, "by their nature, personnel reviews are not
 18 where a business discusses its policies and practices" and instead simply "show that an employee
 19 held a particular role" or "contributed to a project." *Id.* at 5-6. However, [REDACTED]

20 [REDACTED]
 21 [REDACTED] For example, an [REDACTED]

22

23 ¹ At the same time, Amazon does not address the fact that a custodial collection will not capture
 24 all relevant documents because custodians generally do not have access to their own personnel
 materials. *See Mot. 5-6* (Dkt. #331).

1 [REDACTED]

2 [REDACTED]

3 • [REDACTED]

4 [REDACTED]

5 Baker Decl. Ex. A², Amazon-FTC-CID_06768414 at -427.

6 • [REDACTED]

7 [REDACTED]

8 • [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 • [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 These instructions, and the limited personnel materials Amazon produced in Plaintiffs' pre-Complaint investigation, Mot. 4-5 (Dkt. #331), show that the requested materials are likely to be a particularly rich source of information regarding Amazon's business goals and operations. These materials are not the "cursory write-up[s]" Amazon previously represented them to be. Aug. 28, 2024 Joint Status Report at 38 (Dkt. #273).

19 Contrary to Amazon's claim that Plaintiffs have "refused any reasonable narrowing,"
20 Opp. 3, Plaintiffs' narrowed request relates to files in a centralized repository and is limited to a
21 "discrete list of relevant personnel reviews proportionate to Plaintiffs' needs," *id.* at 7—

23 _____
24 ² Citations to "Ex. A" refer to the exhibit attached to the Declaration of Michael Baker (Dkt. #364).

1 Amazon's document custodians. As Amazon recognizes, “[d]ocument custodians were
 2 designated based on negotiations between the parties” and “custodians are employees who held
 3 roles concerning business activities that Plaintiffs claim are relevant to their claims.” *Id.* at 4 n.1.
 4 Producing these materials will make discovery more efficient by allowing Plaintiffs to target and
 5 prioritize custodians for depositions. *See* Mot. 6.

6 Finally, Amazon argues that “sensitivity concerns” warrant limiting Plaintiffs’ access to
 7 these materials and suggests that Plaintiffs intend to use those documents simply “to make
 8 witnesses uncomfortable.” Opp. 5-7. Plaintiffs have no interest in intentionally embarrassing
 9 deponents, and Amazon has shown no basis to claim otherwise. Plaintiffs are interested only in
 10 obtaining evidence to prove their claims and have a well-founded belief that the requested
 11 materials are likely to materially assist in achieving that goal.

12 Amazon’s arguments ring hollow given that it has already agreed to produce personnel
 13 documents found in custodial files. The Court has entered a protective order governing
 14 confidential information, which should address any real concerns about sensitive information.
 15 *See* Protective Order ¶4.1 (Dkt. #160); *see also* *Hill v. Auto Owners Ins. Co.*, 2015 WL 2092680,
 16 at *13-14 (D.S.D. May 5, 2015) (“Auto Owners argues that sensitive information weighs against
 17 discovery, but the court has entered a protective order in this case to alleviate privacy
 18 concerns.”); *Moya v. City of Clovis*, 2019 WL 4193427, at *3 (D.N.M. Sept. 4, 2019) (“The
 19 Court is cognizant of the many highly personal and sensitive materials in personnel files, but the
 20 appropriate remedy is to craft a protective order for the Court’s consideration that protects those
 21 materials from public consumption, not unilaterally barring access to information.”). Moreover,
 22 if Amazon actually believed that specific restrictions on the use of personnel documents were
 23 warranted, it could have proposed a further protective order at any time during months of
 24

1 negotiations. That it did not do so—and has only sketched out vague restrictions for the first time
 2 in its Opposition—shows that this is simply another delay tactic. The Court should not allow
 3 Amazon to limit its production to the scattered and incomplete assortment of personnel
 4 documents that may exist in custodial files when a full set can be efficiently collected from a
 5 central repository.

6 **II. AMAZON CANNOT JUSTIFY ITS BLANKET REFUSAL TO PRODUCE
 7 DOCUMENTS RELATING TO FOREIGN INVESTIGATIONS AND
 8 REGULATORY REGIMES.**

9 **A. Amazon Should Not Benefit From Its Refusal to Negotiate the Scope of These
 10 Requests.**

11 Amazon argues that Plaintiffs' requests are overbroad and not limited "to any specific
 12 investigation" or "topic." Opp. 10.³ This claim wholly ignores Plaintiffs' offer to narrow the
 13 scope of RFP Nos. 376 and 387 if Amazon would provide a list of competition investigations so
 14 that the parties could discuss which investigations were relevant. *See* Mot. 8, 12. Amazon
 15 refused. Amazon should not be allowed to parlay that strategic refusal to negotiate into a basis to
 16 resist discovery, and it is too late to begin those negotiations now, as Amazon suggests in the
 17 alternative. Opp. 13.

18 **B. Amazon Has Not Addressed the Relevance of These Documents or
 19 Substantiated Any Claim of Undue Burden.**

20 Amazon generally claims that Plaintiffs' requests seek "plainly irrelevant files," *id.* at 9,
 21 but does not address Plaintiffs' arguments that Amazon documents related to foreign competition
 22 investigations are relevant to the validity of Amazon's professed procompetitive justifications,

23 ³ Amazon also incorrectly argues that Plaintiffs are seeking a "worldwide search for any and all
 24 regulatory materials," Opp. 13, but acknowledges that Plaintiffs have narrowed RFP No. 377 to
 three specific regulatory regimes, *id.* at 9.

1 potential less restrictive alternatives, or potential remedies, Mot. 7-14. Amazon also does not
 2 address Plaintiffs' identification of public foreign investigations that involve conduct similar to
 3 the challenged conduct here. *See id.* at 9-11. Amazon instead argues that Plaintiffs' requests are
 4 too broad—implicitly conceding that at least some of the documents Plaintiffs seek contain
 5 relevant information. But Amazon notably fails to provide any factual support for its claim that
 6 Plaintiffs are seeking “plainly irrelevant files,” Opp. 9, and rejected Plaintiffs’ efforts to
 7 negotiate the scope of the requests at issue.

8 Amazon has also failed to substantiate any claims of undue burden. Amazon represents
 9 that there is “no single repository” containing the requested materials, Roach Decl. ¶ 5 (Dkt.
 10 #348), but that is hardly unusual, and Amazon has not suggested that it has so many relevant
 11 document repositories that a search would be unduly burdensome. Plaintiffs are not seeking any
 12 additional custodians in connection with these requests, and Amazon has agreed (for the first
 13 time) to apply Plaintiffs’ proposed search terms.⁴ The only other burden issue is the potential that
 14 some documents will require foreign language review. However, Amazon has not offered any
 15 facts showing that foreign language review will be widely necessary or burdensome, much less
 16 unduly burdensome. As a result, that cannot justify Amazon’s refusal to produce documents. *See*
 17 *Doe v. Trump*, 329 F.R.D. 262, 270 (W.D. Wash. 2018) (party opposing discovery “has the
 18 burden to show that discovery should not be allowed, and has the burden of clarifying,
 19 explaining, and supporting its objections with competent evidence”); *Frame-Wilson v.*
 20 *Amazon.com, Inc.*, 2023 WL 4201679, at *2, *4 (W.D. Wash. June 27, 2023) (rejecting undue
 21 burden argument where Amazon failed to show “that the requested discovery here will be
 22 disproportional”).

23
 24 ⁴ As a result, the Court should at minimum order section 3(f) of Plaintiffs’ Proposed Order (Dkt.
 #333-1).

1 **C. Amazon Has Not Shown That International Comity is an Issue Here.**

2 Amazon incorrectly claims that Plaintiffs' document requests "threaten to violate
 3 principles of international comity." Opp. 11. While Plaintiffs recognize the importance of
 4 international comity, *see, e.g.*, U.S. Dep't of Just. & Fed. Trade Comm'n, Antitrust Guidelines
 5 for International Enforcement & Cooperation § 4.1 (Jan. 13, 2017), those principles do not
 6 provide a basis for Amazon to withhold the requested documents here. Amazon has not made the
 7 required particularized showing with respect to specific documents or implicated U.S. and
 8 foreign laws, policies, and interests.

9 A proper analysis of international comity requires application of a multi-factor test.

10 *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482
 11 U.S. 522, 544 n.28 (1987); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1476
 12 (9th Cir. 1992). Amazon addresses only one factor. Opp. 11-12. Amazon also misstates that
 13 factor, claiming that it is "'whether the disclosure would affect important substantive policies or
 14 interests' of the countries whose legal and regulatory documents are sought." *Id.* at 12
 15 (misleadingly quoting *Richmark*). The relevant factor, as explained in *Richmark*, actually calls
 16 for a *balancing* of the interests of the United States with those of foreign nations. 959 F.2d at
 17 1476 ("We must assess the interests of *each nation* in requiring or prohibiting disclosure, and
 18 determine whether disclosure would 'affect important substantive policies or interests of *either*
 19 *the United States or the [other country].*'") (emphasis added). Amazon's inaccurate statement of
 20 the law completely fails to address the United States' interests here, in a government
 21 enforcement action.

22 Even as to the potential interests of foreign sovereigns, Amazon has failed to provide the
 23 required "particularized analysis of the respective interests of the foreign nation and the
 24 requesting nation." *Aerospatiale*, 482 U.S. at 543-44. Amazon has not shown how any specific

1 foreign interests are implicated, or even identified which jurisdictions' interests would be
 2 implicated. Amazon relies on a single citation to a general principle from an amicus brief filed
 3 by one foreign competition agency 14 years ago, Opp. 12 (citing Memorandum of Law of
 4 *Amicus Curiae* the European Union, *In re Payment Card Interchange Fee & Merchant Disc.*
 5 *Antitrust Litig.*, 2010 WL 9937917 (E.D.N.Y. Mar. 19, 2010)), but never addresses how the
 6 assertions regarding the two documents at issue there have any applicability here. Nor has
 7 Amazon further addressed international comity as it relates to any particular documents sought
 8 by Plaintiffs in this case. *Aerospatiale*, 482 U.S. at 545-46; *id.* at 544 n.29 (a foreign statute is
 9 relevant “to the court’s particularized comity analysis only to the extent that its terms and its
 10 enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of
 11 material”). Amazon’s argument that *any* response to these requests for production violates
 12 principles of comity lacks the necessary specificity. In particular, Amazon has not addressed how
 13 producing a non-privileged ordinary course document discussing a change made to Amazon’s
 14 conduct in a foreign jurisdiction would violate principles of comity. Nor could it. Memorandum
 15 and Order, *In re Payment Card*, 2010 WL 3420517, at *10 (E.D.N.Y. Aug. 27, 2010)
 16 (“[P]laintiffs are entitled to discovery of the defendants’ existing business documents, including
 17 those that were disclosed to the European Commission.”). The Court should disregard Amazon’s
 18 sweeping, unsubstantiated attempt to raise international comity in order to shirk its obligations to
 19 produce relevant discovery.

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*I certify that this brief contains 2,099 words, in
compliance with the Local Civil Rules*

2 Respectfully submitted,

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